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JAMES D. MAHER
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Supreme Court of the United States

October Term 1919

No. 9[redacted]77

THE BANK OF JASPER,
Petitioner,

VERSUS

THE STATE BANK OF ROME,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

F. P. FLEMING,
Attorney and of Counsel for Petitioner.

THE DREW PRESS, JACKSONVILLE 3041908

In the Supreme Court of the United States

October Term 1919

THE BANK OF JASPER, a corporation,
Petitioner,

vs.

THE STATE BANK OF ROME, a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of The Bank of Jasper, a corporation, respectfully shows unto this Honorable Court as follows:

First: This cause involves a conflict between the Supreme Court of the State of Florida and the United States Circuit Court of Appeals in and for the Fifth Circuit.

Second: This cause was instituted against your petitioner in the United States District Court in and for the Southern District of Florida on the 27th day

of January A. D. 1913, by the respondent, American Bank and Trust Company (now known as The State Bank of Rome) seeking to recover on certain certificates of deposit issued by your petitioner, (Transcript p. 1). The jurisdiction of the trial court was based on diversity of citizenship, (Transcript, p. 3).

Third: Prior to the institution of this action in the United States District Court as aforesaid, on, to-wit, the 3rd day of January, A. D. 1913, there were filed in the Circuit Court, in and for Hamilton County, Florida, a court of general jurisdiction, bills of complaint by W. S. Murrow and G. R. Brown, in separate suits, against Rome Insurance Company, American Bank and Trust Company, (the original plaintiff in this suit) and against your petitioner (Transcript pp. 9, 11, 36 and 50); that in and by said bills of complaint it was prayed that certain certificates of deposit, (being the same certificates of deposit sued on in this cause) be declared to be null and void, and that your petitioner be restrained from paying the proceeds thereof to American Bank and Trust Company or any one for it, (Transcript pp. 36 to 46; 50 to 59); that said certificates of deposit (Transcript pp. 5, 6 and 7), are in words and figures as follows, to-wit:

"No. 320.

"The Bank of Jasper,

$4,704.00

"Jasper, Florida, Nov. 28, 1911.

"American Bank & Trust Company, Trustee, of Rome, Ga., has deposited in this bank Forty-seven Hundred, four and NO/100 Dollars, payable to the order of itself with interest at rate of 4% per annum compounded quarterly,

on the return of this certificate properly indorsed on or after Nov. 28, 1912.

"Not subject to check.

"W. S. MURROW, Cashier.

"Copy.

"Certificate of Deposit.
(Indorsed on back)
Without recourse, American Bank
& Trust Co., Trustee,
by T. J. Simpson, Vice Pres.

American Bank & Trust Co.,
Rome, Ga.
By S. F. Magruder, Cashier.

The Hamilton National Bank,
by C. H. Preston, Cashier.
Pay Atlantic National Bank
Jacksonville, Fla., or order
First National Bank, Cincinnatti, Ohio.
T. J. Davis, Cashier.
Report No. 17343.

"Pay to the order of any bank or banker
coll Nov. 15, 1912, Dept.
63-2 63-2
The Atlantic National Bank,
Jacksonville, Fla.,
D. D. Upchurch, Cashier.

"9. "No. 321.

"The Bank of Jasper,

"$294.00
305.94

"Jasper, Fla., Nov. 29, 1911.

"American Bank & Trust Company, Trustee, of Rome, Ga., has deposited in this Bank Two Hundred Ninety Four and No/100 Dollars payable to the order of itself with at rate of

4% per annum compounded quarterly on the return of this certificate properly indorsed on or after November 29th, 1912.
Not subject to Check.
(Copy) "W. S. MURROW, Cashier.

"Certificate of Deposit.
(Indorsed on back)

Without recourse
American Bank & Trust Company, Trustee,
By T. J. SIMPSON, Vice-President.

Pay any Bank, Banker or Trust Co.
or order
Hamilton National Bank
Chattanooga, Tenn.
For Collection.
C. M. Preston, Cashier.

"Pay to the order of any Bank, Banker or Trust Co.
All prior indorsements guaranteed.
November 29th, 1912.
American Bank and Trust Co.,
64-83 Rome, Georgia, 64-83
S. F. Magruder, Cashier.

"Collection No. 11673.
Pay any Bank or Banker,
or order
Heard National Bank
Jacksonville, Fla.
C. W. Dendly, Cashier."

That in said suits in the said Circuit Court in and for Hamilton County, Florida, service of process was had upon American Bank and Trust Company, (the original plaintiff herein) by publication, under the provisions of Section 1866, General Statutes of Florida (Transcript pp. 14 and 19); that

your petitioner, a resident of the State of Florida, was personally served with process.

That upon the return day fixed in the order of publication of process, American Bank and Trust Company (original plaintiff here) filed special appearances and motions to quash the service, (Transcript pp. 31 to 34) which motions were in substance confined to the one ground that the proceedings brought in the state court were actions *in personam* and that there had been no personal service on said American Bank and Trust Company. These motions having come on to be heard before the Circuit Court of Hamilton County, Florida, said court on the 3rd day of April, A. D. 1913, did deny said motions.

Thereupon, on the 10th day of April, A. D. 1913, stipulations were entered into between solicitors for the respective parties in the suits in the State courts, (Transcript p. 34), providing that all proceedings in said suits be stayed pending the prosecution of an appeal to the Supreme Court of Florida in the case of B. F. Carter vs. Rome Insurance Company, et als., which appeal was from orders of the State court denying similar motions to quash services by publication on similar grounds, and which appeal under the decisions of the Supreme Court of Florida constituted a general appearance by the appellant American Bank and Trust Company; and it was further provided in and by said stipulation (Transcript p. 35) that the ultimate decision of the said appeal in said case of B. F. Carter vs. Rome Insurance Company, et als., would be decisive of the validity of the service by publication on the defendants in those suits.

That at the June term of the Supreme Court of Florida, said Supreme Court affirmed the order of the lower court in the case of B. F. Carter vs. Rome Insurance Company et. als., (Transcript p. 75), in words and figures as follows, to-wit:

"In the Supreme Court of Florida,
June Term, A. D. 1913.

"Rome Insurance Company, a Georgia Corporation, and
Others, Appellants,
vs.
B. F. Carter, Appellee.
Hamilton County.

"Per CURIAM.

"This case cannot be distinguished from that of Rome Insurance Company, vs. J. H. Corbett, this day decided, and upon the opinion therein, the order herein appealed from is affirmed.

"All Concur."

That the decision of the Supreme Court of the State of Florida in Rome Insurance Company, et als. vs. J. H. Corbett, on the authority of which said case of Rome Insurance Company et. als. vs. B. F. Carter was decided, is in words and figures as follows: (Transcript pp. 76 and 77).

"In the Supreme Court of Florida,
June Term, A. D. 1913.

"Rome Insurance Company, a Georgia Corporation, and
Others, Appellants,
vs
J. H. Corbett, Appellee.
Hamilton County.

"CROCKELL, J:

"A bill was filed in the Circuit Court for Hamilton County against local defendants and also certain non-residents corporations seeking to impound a fund in that county arising out of an alleged fraudulent transaction consummated in that County. Constructive service, in perfect accordance with the Statute was had by publication, and the non-residents corporations appeared specially to quash the service upon the theory that the sole relief prayed was in personam, and that therefore the statute authorizing constructive service by publication does not apply. This motion having been denied these non-residents have sued out what they term a special appeal.

"It may well be that this appeal so operates as a general appearance in the Circuit Court, as to render the question before us a moot one, but the Appellee does not ask us to so hold, and it appears that this is but a test case, upon the decision of which many other cases in that Court are depending.

"The Bill confined its prayer to an adjudication of the funds sought to be impounded, and does not pray for a general personal decree against these non-residents and we are not to assume upon the face of the bill that the Circuit Court will enter an unauthorized decree; and we have not before us any such question of jurisdiction as was involved in the case of Pennoyer v. Neff, 95 U. S., 714.

"The purpose of the statute authorizing constructive service by publication is to notify non-residents of the pending suit so that they may if they care to do so, come into the case and if the statute be followed, there is no right in the non-resident to quash this notice; he has

his right if not waived to object should the Court thereafter commit an error against him.

"Our constructive service statute is broad enough to apply to any suit in equity pending in our Circuit Court and as has been said in Kilpatrick v. Post, 53 N. J. Eq., 591 text 597 32 Atl. Rep. 267, cannot be confined in its operation to the cases where the Court might make final decree or judgment. Further that Court says: 'It was not intended, that the question of the power to enter the ultimate decree or judgment should enter into the question of the right to give notice of the suit to a non-resident, or that this question of jurisdiction should be settled on a motion to discharge the order of publication. The Complainant is entitled to have the question of jurisdiction settled by a final decree.'

"We are not to be understood as holding that the Court might not quash a service by publication, if the bill upon its face showed that it was clearly a common law cause of action, and that the resort to the equity side of the Court was a subterfuge; the bill before us does not present that case.

"The Order is affirmed:

"Shackleford, C. J. and Taylor, Hocker and Whitfield, J. J. concur."

That thereafter, American Bank and Trust Company took no further part in the proceedings in the State Court (Transcript pp. 29 and 30) and on the 14th day of July A. D. 1914, final decrees were entered in the state court (Transcript pp. 13 to 24), which decrees adjudged that the certificates of deposit therein mentioned, (*being the same certi-*

ficates of deposit herein sued upon) were void and of no effect and enjoining your petitioner from paying the proceeds thereof to American Bank & Trust Company or to any one for it.

Fourth: That on the 3rd day of August, A. D. 1914, in this suit instituted in the United States District Court in and for the Southern District of Florida by American Bank and Trust Company (now The State Bank of Rome) against your petitioner, your petitioner did file pleas of *res adjudicata*, (Transcript pp. 9 to 13) setting up the decrees entered in the Circuit Court in and for Hamilton County, Florida, which decrees adjudged the certificates of deposit herein sued upon to be void and of no effect, and which enjoined your petitioner from paying the proceeds thereof to the plaintiff below or to anyone for it. Certified copies of said decrees were attached to said pleas (Transcript pp. 13 to 23).

Fifth: That on the 7th day of September, A. D. 1914 the plaintiff in the trial court, American Bank and Trust Company, (now The State Bank of Rome) filed a demurrer to said pleas, (Transcript pp. 23 to 25), which said demurrer coming on to be heard before the District Judge of said Court, was on the 12th day of January, A. D. 1915, overruled, (Transcript p. 26).

Sixth: That thereafter, on the 15th day of June, A. D. 1915, said American Bank and Trust Company (now The State Bank of Rome) filed replications to said pleas, (Transcript pp. 28 to 31) setting up in

substance by said replications that the chancery suits mentioned in your petitioner's pleas, and which are fully described in the third paragraph of this petition, were actions *in personam;* that no personal service was ever had on said American Bank and Trust Company; that it did not at any time or in any manner appear in said suits, except specially, to contest the service by publication therein made, and that it in no way waived the want of jurisdiction of the State court over its person; there were attached to said replications copies of the records in the said Chancery suits mentioned. (Transcript pp. 31 to 83).

Seventh: That on the 5th day of July, A. D. 1915, your petitioner filed a motion to strike (Transcript pp. 83 and 84) and a demurrer, (Transcript pp. 84 to 86) to said replications which said motion and demurrer coming on to be heard by the Court, the said demurrer was, on the 2nd day of February, A. D. 1917, sustained as to each of said replications. (Transcript pp. 86 and 87).

Eighth: That on the ninth day of January, A. D. 1919, the plaintiff in the trial court filed a declination to plead further (Transcript p. 89). Thereupon, on the 9th day of January, A. D. 1919, final judgment was entered in favor of your petitioner. (Transcript pp. 91 and 92).

Ninth: That from said judgment, said plaintiff sued out a writ of error to the Circuit Court of Appeals of the United States for the Fifth Circuit which Court on the 10th day of March, A. D. 1920,

reversed the judgment of the District Court, holding in effect:

(a) That the Circuit Court in and for Hamilton County, Florida, acquired no jurisdiction over the the person of the American Bank and Trust Company (now The State Bank of Rome), by the service by publication made in said suits.

(b) That said Circuit Court in and for Hamilton County, Florida, acquired no jurisdiction over the fund or *res* sought to be impounded in said chancery suits, as the same was not under the control of the Court.

(c) That the Florida Court had no jurisdiction to render the said decrees as to non-residents.

(d) That the said court did not purport to determine the personal liability of your petitioner to the plaintiff on the said certificates of deposit.

(e) That the prosecution of the appeals by American Bank and Trust Company (now The State Bank of Rome) to the Florida Supreme Court, did not amount to general appearances in the State of Florida, which holding is in conflict with the decisions of the Supreme Court of Florida.

Tenth: That a certified copy of the entire record in this cause in the Circuit Court of Appeals of the United States for the Fifth Circuit is hereby furnished, and filed herewith and reference thereto is hereby made, all in compliance with Rule 37 of this Honorable Court.

Eleventh: Your petitioner is advised and believes that the aforesaid judgment of the United

States Circuit Court of Appeals for the Fifth Circuit is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such case made and provided, said case being made final in said United States Circuit Court of Appeals by the provisions contained in Section 128 of the United States Judicial Code.

Twelfth: Your petitioner further represents unto this Honorable Court that the aforesaid judgment of the United States Circuit Court of Appeals for the Fifth Circuit presents a conflict of State and Federal jurisdiction and in effect reverses the decisions of the Supreme Court of the State of Florida in the cases of Rome Insurance Company, et als. v. B. F. Carter (63 Sou. 834; Transcript p. 75) and Rome Insurance Company et als. v. J. H. Corbett, (63 Sou. 833; Transcript pp. 76 and 77) and denies them full faith and credit, for the following reasons:

(a) The United States Circuit Court of Appeals held that the prosecutions of the appeals in the State Court did not amount to general appearances, whereas, the Florida Supreme Court, following the established rule of practice in that State, held that the prosecution of an appeal constitutes a general appearance in the lower court.

(b) The Florida Supreme Court held that the service of publication upon American Bank and Trust Company (now The State Bank of Rome) original plaintiff in this action, was valid so as to bring its person within the jurisdiction of the court

for the relief prayed in the bills of complaint. The Circuit Court of Appeals held otherwise.

(c) The Florida Supreme Court held that the bills of complaint confined their prayers to an adjudication of a fund sought to be impounded, and that said fund was within the jurisdiction and control of the State Court.

Thirteenth: Your petitioner further represents that said judgment of the United States Circuit Court of Appeals for the Fifth Circuit is erroneous on the following grounds:

(a) The fund impounded by the decree in the State Court had its *situs* in the State of Florida, and not in the State of Georgia; because:

(aa) The money was not to be payable except "on the return of this certificate properly endorsed."

(bb) The certificate was not subject to check.

(cc) The deposit was made for a specific purpose and was not the part of a general fund.

(dd) The *situs* of a debt, for the purpose of administration, is the home of the debtor.

(b) The proceedings in the State Court, the decrees in which were set up as a defense by your petitioner in the District Court, were proceedings *in rem*, to the validity of which personal service is unnecessary.

(c) If any defects existed in the State Court's jurisdiction over American Bank and Trust Company, such defects under the rulings of the Supreme

Court of Florida were waived by the prosecution of the appeals to the Florida Supreme Court.

(d) The decrees relied upon declared the certificates of deposit herein sued upon to be void and of no effect.

Fourteenth: Your petitioner further represents that no question was raised by the plaintiff, either in the District Court or in the Circuit Court of Appeals as to the sufficiency of your petitioner's pleas of *res adjudicata*, except that the proceedings in the State court were actions *in personam* and that no personal service was had on the plaintiff, one of the defendants in those proceedings.

Fifteenth: Your petitioner further represents that the said United States Circuit Court of Appeals for the Fifth Circuit, in denying to your petitioner the benefit of the adjudication of the Supreme Court of Florida of a statute of that state, assumed a jurisdiction which not even the Supreme Court of the United States has power to assume.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of, and under the seal of, this Court, directed to the United States Circuit Court of Appeals, in and for the Fifth Circuit, commanding the said court to certify and send to this Court, on a day certain therein to be designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case entitled "The State Bank of Rome a corporation, plaintiff in error, versus The Bank of Jasper a corporation,

defendant in error, Number 3432," to the end that the said case may be reviewed and determined by this Court, as provided in and by Section 240 of the United States Judicial Code, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with said provision of the Judicial Code, and that the said judgment of said Circuit Court of Appeals in said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray, etc.

F. P. FLEMING,
Attorney and of Counsel for Petitioner.

I, F. P. Fleming, attorney and of counsel for petitioner, do hereby certify that in my opinion the foregoing petition is well founded in law and proper to be granted.

F. P. FLEMING.

In the Supreme Court of the United States

THE BANK OF JASPER, a corporation,
Petitioner,

vs.

THE STATE BANK OF ROME, a corporation,
Respondent.

BRIEF FOR PETITIONER.

The foregoing petition presents a clear case of conflict between a State Court and a United States Circuit Court of Appeals, and for that reason the writ of certiorari should be granted.

While we realize that the granting of such a writ is purely within the discretion of the Court and that such discretion is sparingly exercised, yet the fact that the decisions of a State and a Federal Court are in conflict *in the same controversy*, is considered sufficient grounds for the issuance of the writ.

Forsyth v. Hammond, 166 U. S., 506, 17 Sup. Ct. Rep. 665, 41 L. Ed. 1095.

In the case just cited it was said, referring to the power to issue writs of certiorari:

> "It is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the ques-

> tion involved, *the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state,* or some matter affecting the interests of this nation in its internal or external relations, *demands such exercise.*" (Italics ours).

In that case, as here, there existed a conflict between the decision of a Circuit Court of Appeals and the Supreme Court of a State. In that case, as here, the Circuit Court of Appeals reversed the lower court and sent the case back for further proceedings. It was argued that as the decision in the Circuit Court of Appeals was not final the petition for writ of certiorari was premature, but after referring to the conflict between the State and Federal Courts, it was said:

> "Although no final decree had been entered, it seemed to us a duty to bring the case and the question here for examination at the earliest possible moment."

The conflict in the present case is glaring. The Circuit Court of Appeals held that the appeals prosecuted in the suits in the State Court by the respondent, did not constitute general appearances. This was decided in the very face of the decision of the Florida Supreme Court in the very suit under consideration holding otherwise, and in the face of the established rule in Florida that an appeal constitutes a general appearance, notwithstanding that the appeal may have been for the sole purpose of testing the sufficiency of the service.

In its opinion, the Court of Appeals admitted the Florida rule (Transcript, page 109) but held that

in the proceedings in question, the rule did not operate because the appeals were not from *final*, but from interlocutory decrees.

But in those same proceedings, the Florida Supreme Court held that the appeals from the interlocutory decrees *did* constitute general appearances (Transcript p. 76). The only reason the Florida Court did not base its decision on that ground was because, as stated in the opinion (page 76) it was specially requested to pass on the merits so that many other cases pending in the lower court could thus be disposed of on its authority.

The conflict also appears in that the Florida Court held that the proceedings in the State Court were proceedings *in rem*, to the validity of which personal service was unnecessary, whereas the Court of Appeals held that the *same proceedings* were proceedings *in personam* to the validity of which personal service was essential.

We respectfully submit, that in deciding contrary to the holding of the Florida Supreme Court, the Circuit Court of Appeals committed error, because:

A. Federal Courts must recognize and apply rules of State Courts concerning matters of procedure.

B. In Florida, the prosecutions of appeals constitute general appearances.

C. The proceedings in the State Court were proceedings *in rem*, and personal service was unnecessary.

D. The decrees entered in the State Court constituted a complete defense to this action brought in the Federal Court.

A — FEDERAL COURTS MUST RECOGNIZE AND APPLY RULES OF STATE COURTS CONCERNING MATTERS OF PROCEDURE.

In considering the legality and effect of proceedings in State Courts, Federal Courts are not to be governed by their own rule of procedure, or by the general rule in other jurisdictions, but must apply and be governed by the rules of procedure of the State in which the proceedings were brought. It is an elementary proposition that matter of procedure is governed by the *lex fori*.

In York v. Texas, 137 U. S. 15, 34 L. Ed. 604, this principle was clearly recognized. The facts of the case, as well as the holding of the Court, appear in the following excerpt from the opinion:

> "It was conceded by the district and supreme courts that the service upon the defendant in St. Louis was a nullity, and gave the district court no jurisdiction; but it was held that, under the peculiar statutes of the State of Texas, the appearance for the purpose of pleading to the jurisdiction was a voluntary appearance, which brought the defendant into court. Plaintiff in error questions this construction of the Texas statutes, but inasmuch as the supreme court, the highest court of the State, has so construed them, such construction must be accepted here as correct, and the only question we can consider is as to the power of the State in respect thereto."

The York case has been followed and the rule approved and applied in the following decisions:

> Missouri etc. Ry. v. Goodrich, 234 U. S. 1429; 58 L. Ed. 1578.

Missouri etc. Ry. v. Goodrich, 229 U. S. 607; 57 L. Ed. 1349.

Kauffman v. Wooters, 138 U. S. 287; 34 L. Ed. 962.

McLaughlin Brothers, v. Hallowell, 228 U. S. 289; 57 L. Ed. 840.

Western Ind. Co. v. Rupp, 235 U. S. 261, 59 L. Ed. 220.

In the last cited case it was said:

> "That a state, without violence to the 'due process' clause of the 14th Amendment, may declare that one who voluntarily enters one of its courts to contest any question in an action there pending shall be deemed to have submitted himself to the jurisdiction of the court for all purposes of the action, and may attach consequences of this character even to a special appearance entered for the purpose of objecting that the trial court has not acquired jurisdiction over the person of the defendant, is settled by the decision of this court in York v. Texas, 137 U. S. 15, 34 L. Ed. 604, 11 Sup. Ct. Rep. 9: followed in Kauffman v. Wooters, 138 U. S. 285, 34 L. Ed. 962, 11 Sup. St. Rep. 298."

Elaborating on the principles underlying this rule, the opinion continues:

> "The 14th Amendment declares that no state shall 'deprive any person of life, liberty, or property without due process of law.' This prohibition has regard not to matters of form, but to substance of right. Since its adoption,

> whatever was the rule before, a non-resident party against whom a personal action is instituted in a state court without service of process upon him may, if he please, ignore the proceeding as wholly ineffective, and set up its invalidity if and when an attempt is made to take his property thereunder, or when he is sued upon it in the same or another jurisdiction. Pennoyer v. Neff 95 U. S. 714, 732, 733, 24 L. Ed. 565, 572; York v. Texas, 137 U. S. 15, 21, 34 L. Ed. 604, 605, 11 Sup. Ct. Rep. 9. But if he desires to raise the question of the validity of the proceeding in the court in which it is instituted, so as to avoid even the semblance of a judgment against him, it is within the power of the state to declare that he shall do this subject to the risk of being obliged to submit to the jurisdiction of the court to hear and determine the merits, if the objection raised to its jurisdiction over his person shall be overruled. This prevents a defendant from doing what plaintiff in error has attempted to do in the present case; that is, to secure, if possible, the benefit of a binding adjudication in its favor upon the merits, through the exercise of the court's jurisdiction, while depriving its adversary of any possibility of success by reserving an objection to the jurisdiction of the court to render any judgment against it."

The identical situation presented by the record herein existed in the case of Foster Milburn Co. v. Chinn (C. C. A. 2nd Circuit) 202 Fed. 175, where the Court said:

> "It is certainly the general rule of the federal courts that an objection once taken to the jurisdiction is not waived by the defendant's subsequently answering and taking part in the trial. Harkness v. Hyde, 98 U. S. 476, 25 L. Ed. 237. It is also true that the defendant may attack a

judgment of the court of another state for lack of jurisdiction, either appearing on the face of the record or proved by testimony. Thompson v. Whitman, 18 Wall, 457, 21 L. Ed. 897. It is, however, the law of the state of Kentucky, that though the defendant appear specially to object to the jurisdiction of the court, if he thereafter appeal to a higher court from any judgment recovered against him in the action, he ipso facto waives his objection and transforms his special into a general appearance. It is not necessary for us to determine whether the service of process upon Monroe, as managing agent, was good or bad. We are obliged under section 905, U. S. Rev. St. (U. S. Compt. St. 1901, p. 677), to give full faith and credit to the judgment; that is to say, the same faith and credit it would have 'by law or usage' in the state of Kentucky. So doing, we must treat the defendant as having appeared generally. The trial judge was right in holding that a usage established by the decision of the highest courts of Kentucky is to be given the same effect as if established by statute. In the latter case the Supreme Court has held that such a rule is binding in a suit upon a judgment in the courts of another state. York v. Texas, 137 U. S. 15, 11 Sup. Ct. 9, 34 L. Ed. 604."

B — IN FLORIDA, THE PROSECUTIONS OF APPEALS CONSTITUTE GENERAL APPEARANCES.

In determining, then, the legality of the proceedings in the State Court, the Circuit Court of Appeals erred in not giving full faith and credit to the judgment of the Florida Supreme Court, which considered that the appeal waived the objections to the service. The rule in Florida is well settled that the prosecution of an appeal constitutes a general appearance, and the Circuit Court of Appeals should have applied this rule.

The Florida rule is stated and applied in the following decisions:

Standley v. Arnow, 13 Fla. 361.

Henry v. Spitler, 67 Fla. 146, 64 So. 745.

Busard v. Hutson, 65 Fla. 479, 62 So. 483.

Barnick v. Rouse, 53 Fla. 643, 43 So. 753.

Hayman v. Neil, 53 Fla. 127, 44 So. 176.

Rumeli v. Tampa, 48 Fla. 112, 37 So. 563.

Wylly v. Sanford, L. & T. Co. 44 Fla. 818, 33 So. 453.

Schrader v. Schrader, 36 Fla. 502.

Rome Ins. Co. v. Corbett, Transcript herein p. 76.

The Circuit Court of Appeals in its decision (Transcript p. 109) stated that "The rule in Florida, differing from that which obtains in the Federal Courts, is to the effect that an appellant, though objecting to the insufficiency of service successfully, is considered in Court upon the return of the case to the lower court." On the same page of its opinion the Court of Appeals conceded that "this court will follow the rule of decision in the State Court in passing upon a judgment in that Court."

But the Circuit Court of Appeals failed to follow the State rule of decision on the ground that it was not applicable to an appeal from an interlocutory order of the Court, as distinguished from a final decree. Such a distinction is not made by the Florida Courts. It was made only by the United States Circuit Court of Appeals, which applied *its own rule of decision* instead of that of the Florida Court.

The Supreme Court of Florida indicated very plainly that the rule was applicable in the *same proceedings* considered by the Court of Appeals. And in the case of Rumeli v. Tampa, 48 Fla. 112, 37 So. 563, it appeared that the appeal was from an interlocutory appeal, the only decree mentioned in the opinion of the Court or the statement of facts being a decree pro confesso.

The Circuit Court of Appeals, having granted the correctness of the rule contended for, can not *assume* exceptions to it. The presumption is that the rule applies to all classes of appeals, unless proved otherwise.

West. Ind. Co. v. Rupp, 235 U. S. 261, 59 L. Ed. 220; 225.

Not only is there no basis for the distinction in the Florida decisions, but on the contrary, the rule is applied, as shown by the cases cited, to appeals from final decrees, or from interlocutory orders.

The reason underlying the rule is the same, regardless of the nature of the order appealed from. It is, of course, that any one who so far submits himself to the jurisdiction of the courts of a state as to avail himself of the machinery of the courts to prosecute an appeal, is "in court" and he can not claim at the same time, to be "out of court," by any fiction of special appearance, or so-called "special appeal." It is not the nature of the decree appealed from that determines the fact of appearance, but the fact of *voluntarily taking an appeal.*

Respondent claimed that the appeal in the state court was not "voluntary," but *it failed utterly to show any compulsion of any sort requiring it to resort to appellate procedure.* If it was convinced of the illegality of the service, it could have ignored the proceedings entirely as wholly ineffective, and could have set up its invalidity if and when an attempt was made to take its property thereunder.

West Ind. Co. v. Rupp, 225 U. S. 261, 59 L. Ed. 220.

Pennoyer v. Neff, 95 U. S. 732, 24 L. Ed. 522.

York v. Texas, 137 U. S. 15, 34 L. Ed. 604.

Had no appeal been taken, the question could very well have been raised in this suit in the District Court. But having appealed, *voluntarily,* in the State Court,

respondent waived its objection to the jurisdiction over its person under the undoubted Florida rule.

The reason and the justice of the rule is this: it prevents a defendant from doing what respondent has attempted to do in this case, that is, to secure, if possible, the benefit of a binding adjudication in its favor, *through the exercise of the court's jurisdiction;* and at the same time to deprive its adversary of any possibility of success by reserving an objection that the Court had no jurisdiction to render any judgment against it.

> West Ind. Co. v. Rudd 235 U. S. 261, 59 L. Ed. 220; 225.

These reasons underlying the Florida rule apply regardless of the nature of the decree appealed from, and the Court of Appeals erred in failing to apply it to the proceedings under consideration.

C — THE PROCEEDINGS IN THE STATE COURT WERE PROCEEDINGS IN REM, TO THE VALIDITY OF WHICH PERSONAL SERVICE WAS UNNECESSARY.

In the foregoing pages of this brief we have shown that under the established rule in Florida, the respondent by appealing in the proceedings in the State Court, submitted itself to the jurisdiction of the Court and in effect entered a general appearance. Therefore the respondent was properly before the State Court for the entry of even personal decrees against it.

Even aside from this consideration however, the decrees in the State Court are binding and valid, because they are decrees *in rem*, entered in proceedings *in rem*, and to the validity of which personal service of process, or jurisdiction over the person is unnecessary. All that is essential is that there be a thing, *a res*, property of the defendant, within the Court's jurisdiction.

Here again the Court of Appeals decided contrary to the Supreme Court of the State of Florida. The former held that the proceedings in the State Court were not proceedings *in rem*, because there was no *res* in the control of the State Court, (Transcript p. 108). The Florida Supreme Court held that the proceedings were *in rem*, the bill not praying for a personal decree against the non-residents, but confining its prayer to an adjudication of the funds sought to be impounded, (Transcript, p. 76).

The Circuit Court of Appeals, we contend, is in error in considering the proceedings as actions *in personam*. The decrees in the State Court merely

determined the rights of the parties to the *res* in the jurisdiction of the Court. This *res* was the *indebtedness*, or the supposed indebtedness of petitioner, on the certificates of deposit. These certificates represented a fund in the hands of the petitioner, The Bank of Jasper, a resident corporation.

The Court of Appeals considered the fund as a part of a *general* deposit, and that there was therefore no specific fund over which the Court could exercise control. An examination of the certificates of deposit (Transcript pp. 5, 6 and 7) reveals that they did represent a special fund, or deposit, because they "were not subject to check" and because they were not payable except "on the return of this certificate properly endorsed." The fact that the certificates were in the State of Georgia is immaterial. They were merely the evidence of the deposits, which were in the Jasper Bank. These deposits consisted of the proceeds of promissory notes given by the complainants in the suits in the State Court to respondent and by it endorsed to the petitioner.

But even granting for the sake of argument, that there were no specific funds that could be identified, the *res* still existed. It was the *indebtedness* of the Bank of Jasper, created by the certificate of deposit, and the only purpose of the suits and the only effect of the decrees, was to adjudicate the rights of the parties to that indebtedness.

The Circuit Court of Appeals proceeded upon the theory that there can be no action *in rem* unless there be a *res* in the form of a *tangible* thing. But a *res* may as well be intangible as tangible. It is well settled that a *debt* is a *res* and that its situs is the home of the debtor, where it may be adminis-

tered through actions *in rem*. It is only on the recognition of this principle that garnishment proceedings can be justified. The debtor, The Bank of Jasper, being in the jurisdiction of the State Court, the debt, the *res*, was also in the Court's jurisdiction.

In Bristol v Brent. 30 Utah 108, 21 Ann. Cases 1125, it is said:

> "A proceeding by which jurisdiction is sought by attaching property, whether tangible or intangible, such as a debt, is essentially a proceeding *in rem;* that is, a proceeding against a *rem* which is brought into the custody of the law and hence within the jurisdiction of the Court."

The foregoing citation is presented to show a debt is considered as a *res*, sufficient to support a proceeding *in rem*.

This same principle is illustrated by the following quotation from 12 R. C. L. 777:

> "When the jurisdiction of the Court is based on the attachment of property, such as a debt, and not on the residence of the parties proceeded against, the action is essentially a proceeding *in rem*. For example, an action in one state by a resident thereof against a resident of another state to recover an indebtedness, in which garnishment proceedings are instituted against a foreign corporation doing business in both states, the principal debtor being served by publication, is an action *in rem*, the *res* being the indebtedness due from the corporation to the defendant."

And in 5 R. C. L. at page 930, it is said:

> "The general rule of law is well settled, that for the purpose of founding administration, all simple contract debts are assets at the domicil of the debtor. *And the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, because the bill or note does not alter the nature of the debt, but is merely evidence of it, and likewise it is held in the case of a note that the property has its situs in the place in which the maker resides and not where the note is held.*" (Italics ours.)

The above language is taken almost verbatim from the opinion of this Court in Wyman v. U. S. 109 U. S. 654, 27 L. Ed. 1068.

That a debt is a *res* is further evidenced by the following language used by the court in the case of Swedish American Bank v. Bleeker, 72 Minn. 383, 75 N. W. 740, 42 L. R. A. 283:

> "This is a proceeding *in rem*. Aultman v. Markley, 61 Minn. 404. The *res* is the indebtedness due from the garnishees to the defendant."

The Supreme Court of the United States has also held that a debt is a *res*, the situs of which is the domicil of the debtor. See C. R. I. & P. R. Co. v. Sturm, 174 U. S. 810; 43 L. Ed. 1144, where it was said:

> "The idea of locality of things which may be said to be intangible is somewhat confusing, but if it be kept up the right of the creditor and the obligation of the debtor cannot have the

same, unless debtor and creditor live in the same place. But we do not think it is necessary to resort to the idea at all or to give it important distinction. The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a non-resident to the defeat of his creditor. To do it you must go to the domicil of his debtor and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He and he only has something in his hands. That something is the *res*, and gives character to the action as one in the nature of a proceeding *in rem*. Mooney v. Buford & George Mfg. Co. (34 U. S. App. 581), 72 Fed. Rep. 32; Conflict of Laws, sec. 549, and notes.

"To ignore this is to give immunity to debts owed to non-resident creditors from attachment by their creditors, and to deny necessary remedies. A debt may be as valuable as tangible things. It is not capable of manual seizure, as they are, but no more than they can it be appropriated by attachment without process and the power to execute the process. A notice to the debtor must be given, and can only be given and enforced where he is. This, as we have already said, is a necessity, and it cannot be evaded by the insistence upon fictions or refinements about situs or the rights of the creditor. Of course, the debt is the property of the creditor, and because it is, the law seeks to subject it, as it does other property, to the payment of his creditors. If it can be done in any other way than by process against and jurisdiction of his debtor, that way does not occur to us."

Since, therefore, the law is settled that a debt is a *res*, the situs of which is the domicil of the debtor, if cannot be contended that in the suits in the State courts there was no *res* on which to operate. The debt was the *res*, the debt owing to the plaintiff here by this defendant, Jasper Bank, and the situs of the debt was Hamilton County, Florida the domicil of the debtor. However, as we have seen, the notes, the specific securities and assets represented by the certificates of deposit were also in the custody of the Jasper Bank and within the State court's undoubted jurisdiction.

This indebtedness the Court adjudicated and enjoined your petitioner from paying it to the respondent or any one for it.

The holding in C. R. I. & P. R. R. Co. v. Sturm, 174 U. S. 710, 43 L. Ed. 1144, was followed in New York Life Ins. Co. v. Dunlevy, 241 U. S. 521, 60 L. Ed. 1142 where it was held that a State Court could, on garnishment by an execution creditor, require the amount due a non-resident to be determined, and appropriate it to the payment of the judgment, although the non-resident creditor was not in Court.

In Rothschild v. Knight, 184 U. S. 341, 46 L. Ed. 580, 22 Sup. Ct. 393, it was held that an insolvent's assignee may seize by trustee process a debt due a non-resident defendant, which is alleged to be a fraudulent preference.

This principle was again stated in King v. Cross, 175 U. S. 399, 20 Sup. Ct. 132, 44 L. Ed. 213, which held:

> "A garnishment of a resident debtor to reach a debt due to a non-resident defendant

> *who has no property subject to the jurisdiction of the Court*, does not deprive him of property without due process of law." (Italics ours.)

In the light of the foregoing decisions there can be no question but that the Circuit Court of Appeals erred when it decided (Transcript p. 108):

> "There being no *res* in the control of the Circuit Court of Hamilton County, jurisdiction was not conferred on that court over non-resident defendants by substituted or constructive service."

There *was* a *res*, and it was in the control of the Court. The deposits, the original notes for which the certificates had been issued, were still unpaid and in the possession of The Bank of Jasper, in Florida. They in themselves constituted the *res*. But in addition, there was the *indebtedness* owing by the Jasper bank to the respondent. As the Circuit Court of Appeals said in its opinion (Transcript, p. 113), the certificate of deposit created the same liability on the maker as imported by a promissory note. It was on this indebtedness which the Circuit Court admitted existed, that the jurisdiction of the State Court was based.

The proceedings were not strictly garnishments, but they were analogous thereto. The debtor was within the control and jurisdiction of the Court. A dispute arose as to how the indebtedness should be administered. The complainants in the State Court claimed that the debt should be paid to them, instead of to respondent. This is essentially the theory of garnishment. The situs of the debt being at the

home of the debtor, as held in the cases cited *supra*, that is, in Hamilton County, Florida, the Circuit Court of that county had jurisdiction to administer the rights and claims thereto without obtaining personal service on the non-resident creditor.

The proceedings, while not strictly *in rem*, which are proceedings directly against property itself, are yet actions *in rem* in the broader and more general sense, which includes actions where no preliminary seizure is made, but the purpose of which is solely to try the right of title to property or indebtedness within the Court's jurisdiction. This class of actions is often designated as proceedings *quasi in rem*, but they partake of all the characteristics of, and are really, actions *in rem*.

Pennoyer v. Neff 95 U. S. 714, 24 L. Ed. 565.

Freeman v. Alderson, 119 U. S. 185, 30 L. Ed. 373.

1 Ruling Case Law 328.

Aside from the fact that the proceedings in the State Court were proceedings *in rem*, and jurisdiction of the person of non-resident defendants was unnecessary, there is the further consideration, already pointed out, that in the suits in question, the Court did have jurisdiction over the person of respondent, because by appealing to the Florida Supreme Court, it in effect entered a general appearance.

D — THE DECREES ENTERED IN THE STATE COURT CONSTITUTED A COMPLETE DEFENSE TO THIS ACTION BROUGHT IN THE FEDERAL COURT.

Petitioner in the trial court, in this action brought on the certificates of deposit, properly pleaded the decrees entered in the State Court declaring the certificates void. (Transcript pp. 9 to 13). The Circuit Court of Appeals, in deciding that the trial court erred in overruling respondent's demurrer to the pleas, held that the decrees constituted no defense because: (1) the State Court had no jurisdiction in entering the decrees, (Transcript pp. 107 to 111); and (2) the effect of the decrees, even if the State Court had jurisdiction, was not to declare them absolutely void, (Transcript pp. 111 to 114).

We have already shown that no question of jurisdiction of the State Court can be raised, because in the first place, the proceedings were *in rem* and personal service was not necessary; and in the second place, had jurisdiction of respondent's person been necessary, the State Court had it by reason of the fact that respondent conferred jurisdiction over its person by availing itself of the Court's jurisdiction and prosecuting an appeal.

Turning now to the final ground of the Court of Appeals decision, we see that the effect of the decrees was in fact to declare the certificates of deposit absolutely void, and they undoubtedly constituted a perfect defense to the action on the certificates.

We first wish to point out that it was not proper for the Circuit Court of Appeals to consider the ques-

tion of the *effect* of the decrees. That question was not before it. The only question before it was the *validity* of those decrees, which validity turned on the question of the State Court's jurisdiction. The effect of the decrees, if valid, was in effect *admitted* to constitute a defense, for no question on that score was raised. The only objection raised by respondent in the trial court to the sufficiency of the decrees as a defense, was the claim that the decrees were void because they were entered by a court having no jurisdiction. It was not proper for the appellate court to consider objections not raised by the parties in the trial court. Its only object was to review the questions raised and passed upon in the lower court, and not to consider the pleadings *de novo*.

The only pleadings before the Circuit Court of Appeals were petitioner's pleas of *res adjudicata* and respondent's demurrer and replication to those pleas. In none of these pleadings was it contended that the effect of the decrees, if valid, was not to bar the action. The only objection raised to the pleas by respondent's demurrer and by its replications, was that the decrees were entered in suits *in personam*, and that the State Court in those suits had no jurisdiction over the person of the respondent. This was the only question raised by the pleadings. It was the only question argued by the parties. It was the only question which should have been considered by the Court of Appeals.

It is true, that the first ground of respondent's demurrer to the pleas, (Transcript p. 24) was that the plea "sets up no defense to the cause of action alleged in said count." This general ground of demurrer under the practice in Florida, which governed

the trial court under the Conformity Act, is a nullity. It amounts merely to a repetition of the demurrer and calls nothing to the attention of the Court.

The Supreme Court of Florida, in Heathcote v. Fairbanks-Morse Co., 60 Fla. 97, 53 So. 950, held:

> "A ground of demurrer to a plea that the same 'fails to state any sufficient defense to the plaintiff's cause of action' in effect merely repeats such demurrer and avers that such plea is bad in substance, and is not a compliance with the statute requiring the substantial matters of law intended to be argued to be stated."

All the other grounds of the demurrer were directed to the jurisdiction of the State Court in entering the decree, and the replications (Transcript pp. 28 to 31) were devoted entirely to the same objection. Therefore, the effect of the decrees, if valid, was never raised in the trial court, and should not have been considered by the Circuit Court of Appeals.

The rule concerning the necessity of making objections in the trial court in order that they may be made in an appellate court is well stated in 3 Corpus Juris, 892, where it said:

> "Only objections or grounds of objection urged in the trial court will be considered on appeal. The party will not be permitted to change them or add others. The appellate court is not a forum in which to discuss new points, but merely a court of review to determine whether the rulings of the court below, *as presented*, were correct or not.." (Italics ours).

As this Court said in Robinson & Co. v. Belt, 187 U. S. 41, 47 L. Ed. 65:

"WHILE IT IS THE DUTY OF THIS COURT TO REVIEW THE ACTION OF SUBORDINATE COURTS, JUSTICE TO THOSE COURTS REQUIRES THAT THEIR ALLEGED ERRORS SHOULD BE CALLED DIRECTLY TO THEIR ATTENTION, AND THAT THEIR ACTION SHOULD NOT BE REVERSED UPON QUESTIONS WHICH THE ASTUTENESS OF COUNSEL IN THIS COURT HAS EVOLVED FROM THE RECORD. IT IS NOT THE PROVINCE OF THIS COURT TO TRY THESE CASES *DE NOVO*."

An examination of the transcript of the record in this cause reveals that question as to the sufficiency of decrees as a defense, if valid, was never raised by the parties. Except as to their legality, no objection was made to them. The only place in the record where their effect as a defense, granting their legality, was even suggested, appears in the opinion of the Circuit Court of Appeals.

Besides being improper, the action of the Court of Appeals in deciding against the effect of the decrees as defenses, was erroneous. The decrees constitute an absolute defense to this action on the certificates of deposit.

By the decrees pleaded, (Transcript pp. 13 to 23) it appears that the certificates of deposit concerned had been issued to cover and include the proceeds of certain notes executed by the complainants in the suits in the State Court. The State Court decreed:

(a) That the proceeds of the notes belonged to the complainants.

(b) That the American Bank and Trust Company

had no right, title, interest, claim, or demand of, in and to the proceeds of said notes.

(c) That the defendant Bank of Jasper (petitioner here) be directed to pay the proceeds of the note to the complainants in those suits.

(d) That the certificates of deposit, in so far as they covered the proceeds of the note were void, and of no effect.

There being no question as to the jurisdiction of the State Court to enter the decrees, suits could not be maintained on the certificates of deposit after the decrees were entered. The question of the petitioner's liability on the certificates was *res adjudicata*. It had already been compelled to pay the amounts represented thereby to persons other than the respondent, and respondent was specifically decreed to have no interest therein or right thereto.

What better defense to the action in the lower court could be conceived, than the existence of these decrees? It is a fundamental principle that matters should be litigated but once, and once a competent court has passed on questions in dispute, they must be forever at rest.

But the Circuit Court of Appeals took it upon themselves (although respondent was content with the effect of the decrees, if valid, and only asked the Court to pass upon the question of their validity) to decide that the decrees were insufficient as a defense because they merely established the fact that the non-residents had no right in the "supposed" fund in the Jasper Bank, and did not hold that the Jasper Bank was not personally liable on the certificates.

But the decrees *do* pass on the personal liability

of the Jasper Bank on the certificates of deposit. The certificates represented the proceeds of certain notes, and the Jasper Bank was enjoined from paying those proceeds — in other words the amounts of the certificates — to American Bank and Trust Company, *or to anyone for it*, (Transcript pp. 17 and 22). Is this not an adjudication that the Bank of Jasper should not be liable on the certificates to American Bank and Trust Company or its endorsees?

The decrees further adjudge that the certificates of deposit are *void and of no effect*. Is not this an adjudication that the Bank of Jasper should not be personally or otherwise liable thereon? How can one be liable on a void instrument — on something that has no existence?

But the Circuit Court of Appeals said the decrees did not declare the certificates void absolutely, but only in so far as they covered and included the proceeds derived from the notes (Transcript p. 113). *But there is nothing to show that the entire amount of the certificates did not represent the proceeds of the notes.*

It is true the decrees adjudged the certificates void only in so far as they covered and included the proceeds of the notes, but the record shows that the entire amount of the certificates consisted of the proceeds of the notes. The certificates were issued to cover such proceeds and there is absolutely no showing made that one cent of the amount represented by the certificates consisted in anything other than such proceeds.

If, as a matter of fact, only a part of the amounts represented by the certificates consisted of the proceeds of the note, and if a part of the amount con-

sisted in other deposits, *it was incumbent on the respondent to show it.* The petitioner's pleas of *res adjudicata* (Transcript pp. 9 to 13) allege that the certificates of deposit *represent and cover* the proceeds of the notes mentioned in the decrees. This allegation is not denied. The replications of respondent (Transcript pp. 28 to 32) do not say that the certificates only partially cover the proceeds of the note. They are concerned only with the jurisdiction of the Court in entering the decrees and by their silence, admit that the certificates represented the proceeds of the notes and that therefore the decrees adjudged them totally void and of no effect.

As the pleadings show that the certificates cover only the proceeds of the notes, they show, therefore, that the certificates were declared absolutely null and void. No action could therefore be maintained on them and the decrees pleaded constituted perfect defenses to the action.

CONCLUSION

We respectfully submit that the writ of certiorari applied for should be issued in this instance. The record shows a plain case of conflict between a State and a Federal Court in reference to one and the same controversy.

The Circuit Court of Appeals, we contend, erred in deciding contrary to the Supreme Court of Florida, for the following reasons:

1. The proceedings in the State Court were proceedings *in rem* and jurisdiction over the person of the non-resident defendants was not necessary.

2. The State Court had jurisdiction over the persons of the non-residents by reason of their voluntarily availing themselves of the State Court's jurisdiction to prosecute appeals therein.

3. The only question before the Circuit Court of Appeals was the one of the State Court's jurisdiction to enter the decrees pleaded.

4. The effect of the decrees was to declare the certificates of deposit absolutely void and to bar further action thereon.

Respectfully submitted,

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